



Dash v. Mayweather 731 F.3D 303 (4th Cir. 2013)

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DASH V. MAYWEATHER

731 F.3D 303 (4TH CIR. 2013)

I. INTRODUCTION

In *Dash v. Mayweather*, the United States Court of Appeals for the Fourth Circuit considered whether a new artist could adequately establish a basis for an award of actual damages and profits where his work was misappropriated.¹ The claim filed by Anthony Lawrence Dash (“Dash”) concerned an instrumental track entitled “Tony Gunz Beat” (“TGB”), which he had composed.² The district court had granted summary judgment to the defendants on the issue of damages, which the court of appeals affirmed.³ The court of appeals based its ruling in part on a finding that Dash provided evidence that was too speculative for a jury verdict in his favor.⁴ Due to the growth of music producers sharing their compositions on the Internet, this decision highlights unforeseen issues that may stem from similar collaborations.

II. BACKGROUND

Dash produced TGB in 2005 but did not register the composition with the United States Copyright Office until 2009, gaining an effective registration date of October 13, 2009.⁵ On February 7, 2008, defendant Floyd Mayweather Jr. (“Mayweather”) entered into a contract with defendant World Wrestling Entertainment, Inc. (“WWE”).⁶ The contract required Mayweather to promote and compete at WWE’s biggest event of the year, WrestleMania XXIV (“WrestleMania”).⁷ Tickets to attend the event were sold out when Mayweather’s contract was signed, and the contract failed to discuss what music would be

1. *Dash v. Mayweather*, 731 F.3d 303, 307 (4th Cir. 2013).

2. *Id.*

3. *Id.* at 316.

4. *Id.*

5. *Id.* at 308.

6. *Id.* at 307.

7. *Dash*, 731 F.3d at 307.

used for Mayweather's appearance.⁸ At some point between the signing of the contract and WrestleMania, WWE informed Mayweather that it had chosen a song by musical artist 50 Cent to play as Mayweather made his entrance.⁹ The night before the event, Mayweather told WWE that he had chosen a different song entitled "Yep."¹⁰ "Yep" contained lyrics rapped over TGB, creating a new song.¹¹ Mayweather's team represented to WWE that it owned full ownership rights to the song, and granted WWE the right to use it in connection with Mayweather's appearance.¹² On March 30, 2008, Mayweather appeared at WrestleMania while "Yep" played for approximately three minutes as he made his way to the ring.¹³

On August 19, 2009, Mayweather entered into another contract with WWE to appear as a guest host on the broadcast of WWE's weekly show, RAW.¹⁴ Similar to the WrestleMania contract, this second contract mentioned no specific terms related to what music Mayweather would use as his entrance.¹⁵ On RAW, Mayweather again entered to "Yep."¹⁶

Dash alleged that "Yep" combined lyrics rapped over his instrumental composition, TGB.¹⁷ Dash further claimed that the use of "Yep" for Mayweather's appearances with WWE infringed his copyright in TGB.¹⁸

Dash filed his copyright infringement action against Mayweather, Mayweather Promotions, Mayweather Promotions LLC, Philly Rich Records Inc., and WWE on April 26, 2010.¹⁹ Dash's complaint initially alleged that the defendants violated 17 U.S.C. § 504, and he sought preliminary and permanent injunctive

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 307.

12. *Id.*

13. *Dash*, 731 F.3d at 307.

14. *Id.*

15. *Id.*

16. *Id.* at 308.

17. *Id.* at 307.

18. *Id.* at 308.

19. *Dash*, 731 F.3d at 308.

relief, actual damages, profit damages from the broadcasts of WrestleMania and RAW, and statutory damages.²⁰ However, because Dash did not register his copyright before the dates of the two alleged infringing instances, he amended the complaint to remove statutory damages.²¹

The district court bifurcated the proceedings, which meant that the court put off considering liability until it decided on damages.²² In support of his position, Dash filed a report by a retained expert concerning the actual and profit damages he should receive under § 504(b).²³ Dr. Einhorn's report ("Einhorn Report") highlighted Dash's history as an artist, and the correlation of music and WWE.²⁴ The Einhorn Report highlighted four licensing fees paid to other musicians whose music was used at WrestleMania that year, and concluded that Dash would have received a maximum of \$3,000 in actual damages.²⁵ Einhorn then focused on profit damages, starting with a review of WWE's profits related to WrestleMania and the value of Mayweather's appearance in relation to the net profit of WrestleMania.²⁶ Based on that information, the Einhorn Report found the value of "Yep" to Mayweather's appearance by comparing the time of use of the song to the entire time Mayweather performed at WrestleMania.²⁷ Based on this calculation, Einhorn concluded that WWE profited \$541,521 from the use of TGB at WrestleMania.²⁸ The Einhorn Report also concluded that Mayweather profited \$480,705 from the infringement of TGB using the same calculation.²⁹ The Einhorn Report was not able to calculate the value of TGB to WWE and Mayweather with respect to the broadcast of RAW, as it claimed there was not enough information.³⁰ Based solely on

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 309.

24. *Id.*

25. *Id.*

26. *Dash*, 731 F.3d at 309.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

WrestleMania, Einhorn concluded that Dash should receive at least \$1,019,226 in actual damages because of the alleged infringing use of TGB.³¹

The district court granted summary judgment for WWE and Mayweather, holding that Dash was not entitled to either actual or profit damages under § 504(b).³² Concerning the profit damages, the district court found that Dash did not satisfy his burden of proof, as he did not show that the playing of “Yep” increased the revenue of either WrestleMania or RAW.³³ On the issue of actual damages, the district court found that the defendants proved that TGB did not have market value.³⁴ Because Mayweather and WWE proved that TGB did not have market value, Dash could not prevail on his claim of actual damages.³⁵ Further, Dash’s reliance on the Einhorn Report for the value of TGB provided only speculation because the artists being compared to were not similarly situated.³⁶ Because of the failure to show TGB’s value, the district court granted summary judgment for the defendants and did not proceed to the issue of liability.³⁷

III. SUBJECT OPINION

Dash appealed the district court’s grant of summary judgment as well as its denial of reconsideration concerning the actual and profit damages Dash believed he was owed under 17 U.S.C. § 504(b).³⁸ Section 504(b) states, “the copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”³⁹ The court of appeals stated that 17 U.S.C. § 504(b)’s goal is to compensate for injuries caused by infringement

31. *Id.*

32. *Dash*, 731 F.3d at 309.

33. *Id.*

34. *Id.* at 310.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Dash*, 731 F.3d at 310.

39. 17 U.S.C. § 504(b) (2014).

and to take away any profits gained by infringement to “make clear that there is no gain to be made from taking someone else’s intellectual property without their consent.”⁴⁰ The court first looked at the issue of actual damages.

A. Actual Damages

The court stated that the appropriate method to measure damages for copyright infringement is to calculate the objective market value of the infringed work.⁴¹ Dash alleged his lost licensing fee as the only actual damage, basing the value on what a willing buyer would reasonably pay a willing seller under the circumstances.⁴² The court noted that the Einhorn Report only listed a maximum sum TGB could have received (\$3,000), but did not acknowledge that TGB had an actual market value.⁴³ Although the court said that the Einhorn Report’s failure to state a market value was indicative of the fact that it did not have a value, it also looked to see if the report implicitly suggested one.⁴⁴ The Einhorn Report only listed fees of other artists paid at that WrestleMania event, and only listed Dash’s history as a producer.⁴⁵ Likewise, neither the Einhorn Report nor Dash were able to provide any evidence on the matter of Dash’s prior compensation for his production work.⁴⁶ The Einhorn Report also failed to show any works by Dash that predated the alleged infringements by the defendants.

The court noted that a requirement of evidence of a prior sale or licensing of copyrighted work would deny first time copyright owners any chance to prove actual damages.⁴⁷ To fix this, the court said that first time holders should have access to a variety of methods to show what a buyer would reasonably pay a seller for

40. *Dash*, 731 F.3d at 311-12 (citing *Walker v. Forbes, Inc.*, 28 F.3d 409, 412 (4th Cir. 1994)).

41. *Id.* at 312.

42. *Id.* at 313.

43. *Id.* at 315.

44. *Id.* at 317.

45. *Dash*, 731 F.3d at 317-18.

46. *Id.* at 318.

47. *Id.* at 319.

use of the copyrighted work.⁴⁸ Similar payments made to other artists can be allowed as evidence, unless those payments are too speculative.⁴⁹ However, to be properly used as evidence, those artists and musical works must be comparable to the copyright holder, which Einhorn conceded was not present in his report.⁵⁰ The songs by artists in the Einhorn Report such as the Red Hot Chili Peppers were previously released and controlled by major record labels, making all the other songs at WrestleMania more established than TGB.⁵¹ Because this reasoning would again disfavor new artists like Dash from prevailing on copyright claims, the court said that the copyright holder must show how these non-comparable works would indicate that the holder would have received a fee.⁵² However the court found that neither the Einhorn Report nor Dash provided any such reasoning.⁵³

The biggest concern of the court was that the Einhorn Report noted that “Yep” was a derivative work, but did not explain how that impacted Dash’s claim for damages.⁵⁴ The other works at WrestleMania were complete works, while TGB only made up a part of “Yep.”⁵⁵ Einhorn may have concluded that “Yep” had value, but he did not calculate how much TGB contributed to that value.⁵⁶ This was important because Dash would only be able to receive damages for what he contributed to “Yep,” which was TGB.

The Einhorn Report’s argument on the issue that music is important to WWE because it generates “heat” is a slippery slope.⁵⁷ The court determined that if this argument were accepted, any music regardless of what it was used for would be construed to have value to WWE.⁵⁸ Further, in future cases “to rebut a properly

48. *Id.*

49. *Id.*

50. *Id.* at 320.

51. *Dash*, 731 F.3d at 320.

52. *Id.* at 321.

53. *Id.* at 322.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Dash*, 731 F.3d at 323.

58. *Id.*

supported motion for summary judgment, a copyright holder would need to show only that the infringer generally values the type of copyrighted material infringed, without any evidence that the specific work had a fair market value.”⁵⁹ This reasoning goes against the purpose of § 504(b), as the infringed work must have actual value.⁶⁰ Likewise, the court determined that just because music helps “[raise] heat” and WWE pays artists for that purpose, paying for other music does not mean WWE would have paid Dash for his contribution to “Yep.”⁶¹ The court found Dash did not show that his composition had fair market value, which made any claim for actual damages purely speculative, thus affirming the district court.⁶²

B. Profit Damages

The court noted that profit damages entitle the copyright holder to recover profits from the infringement that are not part of the calculation of actual damages.⁶³ The copyright holder must show the infringer’s gross revenue, and show that he can recover the part of the profit that resulted from the infringing work.⁶⁴ Summary judgment can be used for profit damages if the plaintiff does not meet his burden of showing the infringer’s gross revenue from the infringement because either “1) there exists no conceivable connection between the infringement and those revenues; or 2) despite the existence of a conceivable connection, [the plaintiff has] offered only speculation as to the existence of a causal link between the infringement and the revenues.”⁶⁵

To help decide the issue of profit damages, the court cited some of its past decisions.⁶⁶ The earliest was *Walker v. Forbes*, which concerned the question of what sort of profit damages a plaintiff should receive when the item infringed is only one part of the

59. *Id.*

60. *Id.* at 324.

61. *Id.*

62. *Id.* at 325-26.

63. *Dash*, 731 F.3d at 326 (citing 17 U.S.C. § 504(b)).

64. *Id.* at 326 (citing 17 U.S.C. § 504(b)).

65. *Id.* at 328.

66. *See id.* at 326-27.

defendant's product.⁶⁷ The plaintiff sued a magazine because it had used one of his pictures in an article, and demanded the revenue from that issue.⁶⁸ The court granted three thirty-fifths of one percent of the issue's revenue, which the plaintiff appealed.⁶⁹ The court upheld the judgment, concluding when "the infringement occurs as a small part of a much larger work, the fact finder properly focuses not on the profit of the work overall, but only on the profit that the infringement contributes."⁷⁰ If the infringed item only makes up a small portion of the defendant's revenue, damages must be equally small.⁷¹

The court then analyzed *Bouchat v. Baltimore Ravens Football Club*. The defendants had used plaintiff's logo for their football team.⁷² As a result, plaintiff sought profit damages from many different revenue streams that were as varied as signs at the parking lot, to the logo being featured in video games.⁷³ On appeal, the court held that the plaintiff had to prove gross revenue that was reasonably related to the infringement.⁷⁴ If a plaintiff cannot show more than speculation of a link between the infringement and the claim for revenue, summary judgment is allowed.⁷⁵ Along with that, if the defendant can show the profit came from factors that were not the copyrighted work, summary judgment is likewise appropriate.⁷⁶ The court found that some of the revenue streams were licensing agreements that occurred before the infringement, which obviously severed any connection to the infringement.⁷⁷ The other revenue streams had been shown to only have a speculative connection which plaintiff did not

67. *Id.* at 326; *see generally* Walker v. Forbes, Inc., 28 F.3d 409 (4th Cir. 1994).

68. *Id.*

69. *Id.*

70. *Id.* (citing Walker, 28 F.3d at 415).

71. *Dash*, 731 F.3d at 326

72. *Id.* at 327; *see generally* Bouchat v. Balt. Ravens Football Club, Inc., 346 F.3d 514 (4th Cir. 2003).

73. *Id.* at 327.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Dash*, 731 F.3d at 328.

adequately show was connected to the infringement.⁷⁸ As a result, summary judgment was granted for the defendant.⁷⁹

The most recent case the court analyzed was *Bonner v. Dawson*, which concerned the defendant constructing and leasing a building that infringed on the plaintiff's architectural copyright.⁸⁰ Plaintiff asked for all the lease revenue, which was not granted.⁸¹ On appeal the court concluded that the plaintiff satisfied *Bouchat* because he had shown "evidence of the profits generated by the leasing agreements in the infringed building because this amount was derived exclusively from the infringed building; no other source contributed to the generated funds."⁸² However, the defendant had presented evidence of revenue that a jury reasonably could have decided came from other factors that were not the infringement.⁸³ As a result, the court upheld the judgment of the lower court.⁸⁴

The above precedent highlights that showing a conceivable connection is not a demanding standard; a court can consider a claim even if it is not likely that the infringement had any impact on the revenue.⁸⁵ The connection at a minimum must be hypothetically possible.⁸⁶ In this case, consumers paid revenue (the event was sold out) before knowing that "Yep" would be played as Mayweather came to the ring.⁸⁷ Dash admitted that he had no evidence that the playing of "Yep" at either show helped to increase revenue.⁸⁸ Dash simply contends that since it was played, the revenue was derived from infringement of the TGB

78. *Id.*

79. *Id.*

80. *Id.*; see generally *Bonner v. Dawson*, 404 F.3d 290 (4th Cir. 2005).

81. *Id.*

82. *Id.* at 329 (citing *Bonner*, 404 F.3d at 294).

83. *Dash*, 731 F.3d at 329.

84. *Id.*

85. *Id.* at 330 (citing *Bouchat*, 346 F.3d at 525)_(holding that a connection existed between a logo and the defendants' sale of trading cards and football video games even though it was unlikely anyone bought these items for that logo).

86. *Id.*

87. *Id.* at 332.

88. *Id.*

copyright.⁸⁹ The court thought it was unreasonable to argue that a person would order WrestleMania on Pay-Per-View or watch an episode of RAW just to hear “Yep” be played.⁹⁰

The court concluded Dash’s complaint simply alleged that WWE and Mayweather’s revenues derived from something that included TGB.⁹¹ Rejecting that position, the court reasoned that Dash needed to show a reasonable relation to the revenue of WWE and Mayweather and the infringement of TGB.⁹² Because of this lack of reasonable basis, summary judgment was proper.⁹³

IV. FUTURE IMPLICATIONS

The decision in *Dash v. Mayweather* used the standard set forth in *Walker*, *Bouchat* and *Bonner* to hold that Dash should not receive profit damages, and based its holding of no actual damages on the Einhorn Report’s failure to establish a fair market value.⁹⁴ The music industry has changed: now new artists put their compositions for free online and “anything can happen.”⁹⁵ To get noticed, new producers like Dash have to email their compositions to musical artists or upload them online and hope they get attention.⁹⁶ The decision in *Dash* shows the court’s response to the potentially new and increasing problem of these compositions being found and repurposed by other artists.

The Einhorn Report was considered too speculative on the issue of actual damages to be of any use to Dash.⁹⁷ The court boiled

89. *Dash*, 731 F.3d at 332.

90. *Id.* WWE Pay-Per-Views are priced at \$44.95, except WrestleMania, which is priced at \$54.95. *Events/TV/PPV*, WWE, <http://www.wwe.com/help/eventstvppv> (last visited Jan. 18, 2014).

91. *Dash*, 731 F.3d at 333.

92. *Id.*

93. *Id.*

94. *Id.* at 333.

95. *Clams Casino: Injecting Hip Hop with a Healthy Dose of Internet-Age Experimentalism*, RED BULL MUSIC ACADEMY, http://www.redbullmusicacademy.com/lectures/clams-casino?template=RBMA_Lecture%2Ftranscript (last visited on Jan. 18, 2014).

96. *Id.*

97. *Dash*, 731 F.3d at 325.

down Dash's options for actual damages to either showing prior sale for his compositions, or having the Einhorn Report better explain the logic of comparing Dash's composition to those of the established artists played at that year's WrestleMania.⁹⁸ For a new artist like Dash, the first option could be impossible if, like many producers, he simply put his work on the Internet in an attempt to get noticed. The second option may be equally difficult when Dash is being compared to a band with multiple RIAA platinum albums and a record contract like the Red Hot Chili Peppers.⁹⁹

Although the Einhorn Report may have been off base in comparing Dash and TGB to established artists and their songs, TGB still has value. The claim that TGB has no market value does not make sense. Mayweather insisted on using TGB as the beat for "Yep," which shows that the song must have had some sort of value to him. If Mayweather thought TGB was that important, he would have probably paid something to use the song as part of "Yep."

On the issue of profit damages, the court concluded that the defendant's gross revenue did not have a reasonable relation to the infringement of the plaintiff's copyright.¹⁰⁰ The court held that Dash did not meet this standard because there was no evidence that "Yep" brought additional revenue, as no consumer would buy WrestleMania or watch RAW to simply hear that song.¹⁰¹

This decision is not out of line with the precedent cited by the court. As discussed in *Walker*, TGB was only a part of "Yep," so Dash could only be entitled to a fraction of what "Yep" added to WrestleMania's revenue.¹⁰² *Bouchat* and *Bonner's* reasoning was found in this case as well. Because Dash could not show that "Yep" had any sort of connection to the revenue streams from WrestleMania, he would not be able to claim profit damages from

98. *Id.*

99. *American Certifications-Red Hot Chili Peppers*, RECORDING ARTIST INDUSTRY OF AMERICA, <http://www.riaa.com/goldandplatinumdata.php?artist=%22Red+Hot+Chili+Peppers%22> (last visited Jan. 18, 2014).

100. *Dash*, 713 F.3d at 329.

101. *Id.* at 332.

102. *See Walker*, 28 F.3d at 415.

the event.¹⁰³ Simply showing that “Yep” was played at the event was not sufficient to show that Dash was entitled to damages.¹⁰⁴ Dash had to show that customers paid for WrestleMania to hear “Yep.”¹⁰⁵

It will be difficult for an artist in a similar situation to ever claim that the use of his or her composition would boost revenue. Music plays a large role at many different sporting events, not simply at WrestleMania. Baseball has long had a tradition of using “walk up songs” as a player walks out to hit.¹⁰⁶ Similar to Dash, it would be difficult for any musician to claim that a consumer bought a ticket for a baseball game to hear a certain player’s walk up music.

As a result, new, unknown music producers or other artists may find their compositions being repurposed and used in ways that the composer did not intend. If such a producer tried to take the infringer to court for violating 17 U.S.C. § 504(b), the reasoning of *Dash* may make recovery difficult.

V. CONCLUSION

Dash held that Dash’s copyright infringement claim was too speculative because he could not show a market value for TGB, or any proof that TGB impacted revenue at WrestleMania.¹⁰⁷ This holding illustrates the difficult standard that new producers in the Internet age will need to satisfy a claim for damages under 17 U.S.C. § 504.

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103. *Dash*, 713 F.3d at 333.

104. *Id.* at 332-33.

105. *Id.* at 332.

106. Jeff Ruby, *Walk-up Songs in Baseball*, CHICAGO MAG. (May 24, 2010), <http://www.chicagomag.com/Chicago-Magazine/May-2010/Walk-up-Songs-in-Baseball-Cubs-White-Sox/>.

107. *Dash*, 713 F.3d at 333.

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